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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~1074~~

Misc. No. .....

ALGIRD A. PETKUS,

Petitioner,

vs.

THE STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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IN THE

SUPREME COURT OF THE UNITED STATES

ALGIRD A. PETKUS,

Petitioner

v.

THE STATE OF NEW HAMPSHIRE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

Petitioner, Algird A. Petkus, respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of New Hampshire entered in Case No. 5883, on September 8, 1970.

OPINION BELOW

The opinion of the Supreme Court of New Hampshire affirming the conviction of petitioner of operating a motor vehicle on a public way under the influence of intoxicating liquor (Appendix A. pp. 13-17 below) will be reported 110 N.H.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Was the petitioner deprived of his constitutional right to counsel when the police refused to call his attorney before the blood sample under the State's Implied Consent Law was drawn and after petitioner specifically requested counsel prior to submitting to the blood test?

2. Was the petitioner placed in double jeopardy in violation of his constitutional rights when the Trial Court allowed the respondent, State of New Hampshire to reopen after it had rested, in order to allow the respondent, State of New Hampshire, to prove an essential element of the offense charged?

STATEMENT

A complaint was brought in the Manchester District Court charging the petitioner with a violation of N.H. RSA: 262-A:62, in which it was alleged that the petitioner operated a motor vehicle under the influence on a public way.

A hearing was held in the Manchester District Court on April 3, 1968. The petitioner was found guilty and appealed to the Hillsborough County Superior Court.

A trial by jury was held in the Hillsborough County Superior Court on September 19, 1968 and September 20, 1968. The verdict of the jury was guilty.

During the trial, the petitioner made motions for the suppression of evidence and for a directed verdict, both at the conclusion of the respondent, state's evidence and at the conclusion of all the evidence. These motions by the petitioner were denied by the Superior Court. The petitioner also seasonably excepted to certain rulings of the Superior Court admitting and excluding evidence, and to certain portions of the Court's charge and to the failure of the Court to charge as the petitioner had requested.

After the verdict, the petitioner filed a motion to set aside the verdict. This motion was denied by the Superior Court and the petitioner seasonably excepted to this denial.

The Superior Court reserved and transferred all questions of law raised by the exceptions taken by the petitioner during and after the trial.

At the start of the trial, a hearing was held outside of the jury's presence on the question of the admissibility of the blood test evidence which the respondent, State was going to offer in evidence against the petitioner during the trial. Two police officers, Captain Lawrence J. Shea and Officer Earl Durant, along with the petitioner Algird A. Petkus testified at this preliminary hearing.

Captain Shea testified that he was in charge of the Police Station on the night of March 1, 1968 when the petitioner was arrested by Officer Earl Durant and brought into the station to be booked on the charge of driving while under the influence. The essence of his testimony was that at the time of the booking he advised the petitioner of his constitutional rights with respect to having an attorney. He further testified that at no time while he was in the presence of the petitioner, did the petitioner request an attorney. Captain Shea also testified that he warned the petitioner of the requirements of the implied consent law, with respect to the petitioner giving a sample of his blood. After the booking procedure was finished, the petitioner was taken down to a cell to await the arrival of a medical technician who would draw the blood. When the medical technician arrived, Captain Shea was not present. The only individuals present were the arresting officer, Earl Durant and another police officer known as the houseman.

Officer Earl Durant testified that he arrested the petitioner on the night of March 1, 1968 and charged him with the offense of driving while under the influence. He testified that he warned the petitioner of his constitutional rights at the time of the arrest and that he was present when Captain Shea again advised the petitioner of his constitutional rights at the time of the booking in the police station.

In response to questions asked by the Court, the officer testified that the petitioner first requested a lawyer at the time that the technician was present and ready to draw the petitioner's blood. Officer Durant testified that he did not call a lawyer at

that time but instead told the petitioner that they would take the blood sample and then allow him to call his lawyer. The testimony on this point is as follows, at pages 9 and 10 of the transcript:

THE COURT: You were present when he was given the test later?

THE WITNESS: The blood test, yes.

THE COURT: Was there any request at any time prior to his taking the test . ther for an attorney or a doctor of his own choosing or anything of that nature?

THE WITNESS: He had a request about the technician at which time he wanted a lawyer — wanted to call his lawyer.

THE COURT: When was this?

THE WITNESS: When the blood was going to be drawn.

THE COURT: That's the first time he mentioned it, you say?

THE WITNESS: Yes, sir.

THE COURT: What was said then?

THE WITNESS: He requested his lawyer. I told him, "Well, we will take the blood, and you will be allowed to use the telephone." And then he says, "Well, I want my lawyer." And I told him, "Well, we haven't got the time. We have to take the blood immediately or as soon as possible." And then I explained to him Mrs. Nerbonne — Miss Nerbonne was the technician for the State.

He felt it should have been a doctor. And then I explained the form again that he would be allowed a doctor of his own choosing but he would have to pay the cost which time he accepted to take the blood test, and was brought up immediately to use the telephone.

At page 11, of the transcript, Officer Earl Durant testified on this point as follows:

Q And are you denying the fact that the defendant asked about his attorney as soon as he got to the station?

A He mentioned nowhere along that he wanted an attorney until we were going to draw the blood.

Q And he told you he wanted to talk to his lawyer before he gave the blood sample, isn't that so?

A Yes.

Q And you did not call the lawyer at that time or allow him to?

A No. I explained to him that we were supposed to draw the blood as soon as possible.

Q And you did allow him to call his attorney after the blood was taken?

A Yes, sir. Immediately after the blood was taken, I brought him to the telephone. We got his glasses. We allowed him to use the telephone. He called you. He told me you would be down within a few minutes at which time I sat with him in the guardroom.

The petitioner, Algrid A. Petkus, also took the witness stand at this preliminary hearing. His testimony concerning the refusal of his request to call an attorney before submitting to the blood test is set forth on pages 18 and 19 of the transcript as follows:

THE COURT: Then you got to the station, and what happened?

THE WITNESS: Then I got to the station, and I was made to walk a white line up and down, and they said, "We will book him." I went over to the cage, and they took away my belt, my cigarettes, and my glasses, and so on; and at that time there I requested to call my attorney before being put in the cell, and I was denied and brought down to the cell

> and spent some time in the cell, and then the technician arrived to draw blood. At that time I requested the right to this technician whom I don't want to draw my blood. Also in back of my mind was the drawing of blood seemed to be testifying against myself in the matter; and I wanted legal counsel, and again I requested legal counsel. I wanted to call my attorney, and I was told I couldn't call my attorney until after I submitted the blood. Well, I argued this point with the two officers in there to the point where one of them said, "We will put him back in the cell, and he can wait until morning and go to court in the morning." So at that time I submitted to the blood test, the only way being able to telephone my attorney.

At the hearing held in chambers, following the hearing outside the presence of the jury, petitioner moved to suppress any evidence relating to the blood test that was taken together with the results of such blood test on the grounds that he was denied his right to counsel when he asked for counsel prior to the taking of the blood test.

The petitioner further moved to exclude any evidence pertaining to observations of the petitioner and any admissions he might have made after he asked for counsel and was denied his right to counsel when he requested it prior to the taking of the blood test.

The Court made a finding that the petitioner was properly warned of his rights at the time of the arrest and that he did not request counsel either at the scene of the arrest or at the time of the booking in the police station. The Court further found that the petitioner consented to the giving of blood under the implied consent law after it was explained to him.

The Court further ruled that when he was brought from the cell for the purpose of having his blood taken by a technician, the petitioner stated he would like to consult an attorney prior to the blood being taken. The Court went on to find that Officer Durant would not permit him to call his attorney until the blood had been taken, since the blood was supposed to be taken as soon after his arrest as possible.

The Court concluded its findings by ruling that the blood test was not improperly taken, that the petitioner properly consented to its being taken and that the results of the blood test were admissible in evidence. This ruling was made subject to the exception of the petitioner. (T. 23-24).

At the trial before the jury, 4 witnesses testified for the state. These witnesses were the arresting officer, Earl Durant, the booking officer, Captain Lawrence J. Shea, the medical technician who drew the defendant's blood, Joan Nerbonne, and the chemist employed by the Food and Chemistry of the Department of Public Health of the State Department of Health and Welfare who performed the test in order to determine the alcoholic content of the petitioner's blood sample.

The Respondent, State rested without offering any evidence as to an essential element of the offense, namely, the fact that the offense alleged took place on a public way.

At the conclusion of the Respondent, State's case, the petitioner moved to dismiss on the ground that the State had failed to prove an essential element of the offense charged. The Court allowed the Respondent, State to reopen for the purpose of stating an agreement that defense counsel had with the State wherein it was agreed that Union Street where the offense allegedly took place was a public way. The petitioner objected to this procedure and the Court noted the exception of the petitioner to allowing the State to reopen for the purpose of stating what the agreement had been between defense counsel and the State.

The following colloquy and the Court's ruling and statement to the jury took place at the conclusion of the State's case when it rested, as shown on pages 74 and 75 of the transcript:

MR. KALINSKI: May we approach the bench, Your Honor.

AT THE BENCH

MR. KALINSKI: I don't know how this happened, Your Honor, but I move to dismiss on one ground. The State failed to prove — probably this is unfair. I will agree to this — that this was a public way, but I never stated the agreement to the Jury, and he never made any and rested without it. I don't know what responsibility I have at this point. I admitted to it ahead of time.

THE COURT: I will permit him to reopen.

MR. KALINSKI: All right, Your Honor. That's probably the fairest thing to do. May I just have a moment to collect my thoughts?

THE COURT: Would you like a short recess?

MR. KALINSKI: Yes.

BEFORE THE JURY

THE COURT: I have permitted the State to reopen solely for the purpose of stating an agreement with defense counsel that Union Street where the defendant was operating his automobile was a public way; and the State again rests, and we will take a short recess before the defense goes ahead with their defense.

(Afternoon recess)

MR. KALINSKI: May we approach the bench, Your Honor.

AT THE BENCH

MR. KALINSKI: Your Honor, going back to the motion I made just before the recess, I don't see how I can agree to the procedure followed by His Honor, and I would have to note my exception and take an exception to Your Honor allowing the State to reopen for the purpose of stating what had been our agreement prior to the State closing.

THE COURT: All right, you may have an exception.

MR. KALINSKI: All right, Your Honor. I don't feel in fairness to my client I have a right to agree to that procedure.

THE COURT: All right.

The petitioner also moved for a directed verdict of acquittal at this time on the grounds that the evidence of the blood test was admitted in violation of the petitioner's constitutional rights. The Court denied this motion subject to the petitioner's exception.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL BEFORE THE BLOOD SAMPLE WAS DRAWN.

The evidence is manifestly clear upon the following facts:

A. The petitioner requested the presence of counsel prior to submitting to the blood tests.

B. The petitioner was denied his request to consult with counsel prior to taking the blood test.

The evidence quite clearly establishes the two facts stated above. The findings of the Hillsborough County Superior Court as stated at pages 23 and 24 of the transcript quite clearly supports the above statements and in fact specifically rules that the petitioner was not permitted to call his attorney before the blood test was taken although he requested the right to consult with his attorney before he submitted to this test.

It is submitted that under this state of the facts, the petitioner has been deprived of his constitutional right to counsel.

In upholding the petitioner's conviction, the N.H. Supreme Court relied primarily on this Court's holding in the case of *Schmerber v. State of California,* 384 U.S. 757. The *Schmerber* case is distinguishable on its facts from the situation in this case. In the *Schmerber* case, which involved California law, the police officer had a right to take the blood sample even though the defendant there objected, whereas, under New Hampshire law, if a defendant such as petitioner chooses not to take a chemical test, none shall be given. N.H. Revised Statutes Annotated, 262-A:69-e.

Since the petitioner had the option to consent, or not to consent, and since he specifically asked to call his counsel before he made this decision and was refused this right, the petitioner's

rights under the Sixth Amendment of the Constitution have been violated. *Miranda v. State of Arizona,* 384 U.S. 436.

Consequently, petitioner's motion to suppress the blood test evidence should have been granted and he is entitled to a new trial.

II. PETITIONER WAS PLACED IN DOUBLE JEOPARDY BY THE RULING OF TRIAL COURT ALLOWING RESPONDENT TO REOPEN AFTER IT HAD RESTED, IN ORDER TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED.

As the evidence clearly indicates, the Respondent, State rested its case without offering any evidence at all on an essential element of the offense charged, namely, that the act of driving while under the influence took place on a public way. There was no evidence in the case at all as to whether or not Union Street, where the offense allegedly took place, was a public way.

The petitioner, as noted on page 74 of the transcript, moved for a dismissal on this ground. The Court immediately replied that it would allow the State to reopen. Petitioner's counsel in colloquy, started to agree with the Court and asked for a moment to collect his thoughts, and indicated that he would like a recess. The Court then addressed the jury without affording petitioner's counsel the recess he had requested and permitted the State to reopen for the purpose of stating an agreement whereby the petitioner's counsel and the State had agreed that Union Street was a public way. The Court then declared a recess without affording counsel for the petitioner any further opportunity to make any statement at this point.

The unilateral action of the Superior Court in allowing the State to reopen after it had rested in order to prove an essential element of the offense charged, in effect, amounted to giving the state two separate trials for the same alleged offense committed by the petitioner.

If the situation is analyzed, what happened was that the trial court allowed the State to prove one case against the petitioner in which there was no proof of an essential element of the offense, namely, the fact that Union Street was a public way. The Trial Court, then, after the State rested, allowed the State to prove another case before the same jury, by allowing the State to reopen and thus prove that Union Street was a public way. It is quite clear that the state had in effect two trials.

It is submitted that the Trial Court by allowing the State to reopen placed the petitioner in double jeopardy in violation of his constitutional rights, both State and federal. N. H. Constitution, Part I, Article 16th, U. S. Constitution, 5th Amendment.

On the issue of former jeopardy, The New Hampshire Supreme Court has stated in the case of *State v. Smith*, 98 N.H. 149 (1953) as follows, at page 149:

> "But the test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. . . . It must appear that the offense previously charged was *the same in law and in fact.*"

When the State rested, the petitioner had already been tried once for the offense charged. When the State was allowed to reopen after it had rested, the petitioner, in effect, was tried a second time for the same offense.

Upon this basis, then, the petitioner has been placed in double jeopardy in violation of his state and federal constitutional rights.

CONCLUSION

Petitioner submits that he is entitled to a new trial on the grounds that he was deprived of his constitutional right to counsel under the Sixth Amendment when the police refused to call his attorney before the blood sample was drawn and after he had specifically requested counsel at this point.

Petitioner also submits that he was placed in double jeopardy in violation of his constitutional rights under the Fifth Amendment when the Trial Court allowed the respondent, State, to reopen after it had rested in order to allow the State to prove an essential element of the offense charged which it had failed to prove during its case before it rested.

It is submitted that the petitioner was deprived of his constitutional rights as set forth and is therefore entitled to a new trial.

Respectfully submitted,

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APPENDIX "A"

Hillsborough,

No. 5883

State

v.

Algrid A. Petkus

September 8, 1970.

George S. Pappagianis, Attorney General, and *Thomas B. Wingate,* Assistant Attorney General (*Mr. Wingate* orally), for the State.

Alexander J. Kalinski (by brief and orally), for the defendant.

LAMPRON, J. Appeal from a conviction for operating a motor vehicle on a public way under the influence of intoxicating liquor. RSA 262-A:62. Defendant's exceptions to the denial of his motions to suppress evidence, for a directed verdict, and to set aside the verdict of guilty were reserved and transferred by *Griffith, J.*

Defendant was stopped by a police officer while operating his motor vehicle in a northerly direction on Union Street in Manchester on March 1, 1968. He was placed under arrest and taken to police headquarters where a sample of his blood was taken which on analysis showed an alcohol content of .24 percent by weight.

After a hearing before trial on defendant's motion to suppress any evidence relating to the blood test and its result on the ground that he was denied his right to counsel prior to the taking, the Trial Court made the following findings and ruling:

"The Court finds that the defendant was properly warned of his rights [*Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602] at the time of the arrest, and notified of his right to counsel, that he did not request counsel although he was notified both at the scene of the arrest and at the station when he was first brought in. . . . That subsequent to this he consented to giving blood under the implied consent law after it was properly explained to him [RSA 262-A:69-c]. That when he was brought from the cell for the purpose of the technician taking his blood, at that time he objected to a technician taking his blood and stated that he would like to consult his attorney prior to the blood being taken. At that time Officer Durant informed him that the technician was qualified to take the blood and that he would not permit him at that time to call his attorney until after the blood had been taken as blood was supposed to be taken as soon after his arrest as was possible. He had originally been arrested at some five or ten minutes after midnight, and it was now 12:50. On the basis of this finding, the Court finds that the blood test was not improperly taken, that he did properly consent to its being taken, and it will be admitted subject to the exception of the defendant."

The defendant was in custody under a lawful arrest when a blood sample was taken from him and he does not contend that this constituted an unlawful search and seizure under the Fourth and Fourteenth Amendments of the Federal Constitution. *Schmerber* v. *California*, 384 U. S. 757, 767-772, 16 L. Ed. 2d 908, 917-20, 86 S. Ct. 1826, 1833-836; *State* v. *Davis*, 108 N. H. 45, 226 A.2d 873. Nor did the taking violate defendant's privileges under the Fifth Amendment. *Schmerber* v. *California*, *supra*, 760-765; *People* v. *Mulack*, 40 Ill. 2d 429, 240 N.E. 2d 633. Hence the issue presented is whether under the provisions of the Sixth Amendment a meaningful exercise of the options granted to the defendant under the implied consent law (RSA 262-A:69-a-j) required consultation with counsel and advice as to the alternatives facing him.

The Sixth Amendment which provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense has been construed to apply to critical stages of the proceedings. *Powell* v. *Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64; *United States* v.

Wade, 388 U.S. 218, 224, 225, 18 L. Ed. 2d 1149, 1156, 87 S. Ct. 1926, 1931; *Coleman* v. *Alabama,* 399 U.S. 1, 90 S. Ct. 1999. Under it the presence of counsel has been held required at a post-indictment line-up. *United States* v. *Wade supra.* The fact that such a confrontation "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial" was given as a basis for the decision. *Id.* at 228, 18 L. Ed. 2d at 1158, 87 S. Ct. at 1933.

However, the Court recognized the existence of differences between such a confrontation and "various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, *blood sample,* clothing, hair, and the like . . . which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel." *Id.* at 227, 18 L. Ed. 2d at 1158, 87 S. Ct. at 1932. (Emphasis supplied). The Court stated further that: "Legislative or other regulations . . . which eliminate the risks of abuse . . . may also remove the basis for regarding the stage [line-up] as 'critical' ". *Id.* at 239, 18 L. Ed. 2d at 1164, 87 S. Ct. at 1938. The taking of a handwriting exemplar in the absence of counsel was held not to deny defendant's right under this amendment because of a minimal risk that the absence of counsel might derogate from his right to a fair trial. *Gilbert* v. *California,* 388 U. S. 263, 267, 18 L. Ed. 2d 1178, 1183, 87 S. Ct. 1951, 1953.

The Trial Court was warranted finding on the evidence in the present case that the implied consent law "was properly explained to [the defendant]". RSA 262-A:69-c provides in part as follows:

"Prerequisites to Tests. Before any test specified in section 69-a is given, the law enforcement officer shall (1) inform the arrested person of his right to have a similar test or tests made by a person of his own choosing, (2) afford him an opportunity to request such additional test, and (3) inform him of the consequences of his refusal to permit a test at the direction of the law enforcement officer." A defendant does not require a lawyer's advice to understand or avail himself of the right to have a blood test made by a person of his own choosing. To give blood or refuse and be subjected to revocation of his license for 90 days (RSA 262-A:69 e) is a decision not much different than that of

deciding whether or not to furnish officers an exemplar of defendant's handwriting. *Gilbert* v. *California,* 388 U. S. at 267, 18 L. Ed. 2d at 1183, 87 S. Ct. at 1953.

Furthermore our statute (RSA 262-A:69 i) and our decisions (*State* v. *Gallant,* 108 N.H. 72, 227 A. 2d 597; *State* v. *LaFountain,* 108 N.H. 219, 231 A. 2d 635; *State* v. *Groulx,* 109 N.H. 281, 249 A. 2d 690) provide that a defendant's blood will be taken, handled and analysed in such a manner as to insure that the test and results will not be "riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial." *United States* v. *Wade,* 388 U.S. 218, 228, 18 L. Ed. 2d at 1158, 87 S. Ct. at 1933. Also the techniques involved in such a test are sufficiently established and the variables in techniques few enough so that the defendant has the opportunity for "a meaningful confrontation" of the State's case at trial. *United States* v. *Wade, supra,* 227, 18 L. Ed. 2d at 1158, 87 S. Ct. at 1932; *Gilbert* v. *California,* 388 U.S. at 267, L. Ed. 2d at 1183, 87 S. Ct. at 1953; *Cf. Schantz* v. *Eyman,* 418 F. 2d 11 (9th Cir. 1969).

We hold that the decisions to be made by an accused under our implied consent law are not essentially "a lawyer's decision" (*Schantz v. Eyman, supra* at 14) but, on the contrary, can be made by a defendant in the absence of the assistance of counsel without any substantial prejudice to his rights under the Sixth Amendment. *Gilbert* v. *California, supra*; *Coleman* v. *Alabama,* 90 S. Ct., 1999, 2002. See *State* v. *Kenderski,* 99 N. J. Super. 224, 229-30, 239 A. 2d 249, 251-52; *Finley* v. *Orr,* 262 Cal. App. 2d 656, 663-64; 69 Cal. Rptr. 137, 141-42; *Janusch* v. *Department of Motor Vehicles,* 80 Cal. Rptr. 726, 728 (Cal App. 2d 1969). In other words we hold that the taking of defendant's blood under the implied consent law (RSA 262-A:69-a) was not a "critical" stage of the criminal proceeding requiring the assistance of counsel "to preserve defendant's basic right to a fair trial." *Coleman* v. *Alabama, supra.* The Trial Court properly ruled that the results of the test of defendant's blood were admissable in evidence at the trial.

Counsel for the parties had stipulated before trial that Union Street in Manchester was a public highway. The agreement was not stated in open court and the State rested its case without

entering the stipulation in evidence. Defendant moved for a dismissal on that ground. The Court permitted the State to re-open solely for the purpose of stating the agreement in the presence of the jury and denied defendant's motion to dismiss. He contends that this was error and placed him in double jeopardy.

Decision to permit the State to reopen in this situation rested in the discretion of the Trial Court. *State* v. *Menke,* 25 N. J. 66, 135 A. 2d 180; *State* v. *Burbank,* 156 Me. 269, 278, 163 A. 2d. 639, 643-644; *United States* v. *Glass,* 421 F. 2d 832, 833 (9th Cir. 1969). See *Ricker* v. *Mathews,* 94 N. H. 313, 316, 53A 2d 198; *Sargent* v. *Janvrin,* 109 N. H. 66, 68, 242 A 2d 73, 75. We find no abuse of discretion in the Court's action. Nor did it place the defendant in double jeopardy as he was not being tried a second time for the same offense. *State* v. *Smith,* 98 N. H. 149, 95 A.2d 789; *Rhyne* v. *United States,* 407 F. 2d 657, 661-662 (7th Cir. 1969); *Morgan* v. *United States,* 380 F. 2d 687, 703 (9th Cir. 1967); 5 Crim. L. Bull. 375 (1969).

Exceptions overruled.

GRIFFITH, J., did not sit; the others concurred.

NO. 1074
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

ALGIRD A. PETKUS
PETITIONER

V.

THE STATE OF NEW HAMPSHIRE
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

1. When a state statute requires one properly arrested for operation of a motor vehicle on a public way while under the influence of liquor to submit to the drawing of a blood sample for testing and provides that he shall be informed that his license to operate a motor vehicle

shall be revoked for ninety days for refusal to permit the drawing of the sample, does a person so arrested enjoy the right to the assistance of counsel before submitting to the drawing of the blood or refusing to allow it to be drawn?

2. In a prosecution for operating a motor vehicle on a public way while under the influence of liquor, is the defendant twice put in jeopardy when, after the state has rested, the trial judge informs the jury of the stipulation of the defendant and the state that the street upon which operation took place is a public way?

STATEMENT

Petitioner was arrested on a charge of operating a motor vehicle on a public way while under the influence of intoxicating liquor on the evening of March 1,

1968. He was requested to submit to the drawing of blood for testing, and was advised that he had a right to have a similar test by a person of his own choosing and that a refusal to submit to the drawing of the blood would result in the revocation for 90 days of his license to operate a motor vehicle. Petitioner did not request an opportunity to call his lawyer until just before the medical technician was about to take the sample. R.9. With the technician ready to proceed, the police directed that the sample be taken before petitioner conferred with counsel and explained that such a sample must be taken as soon as possible. R.10. The sample was taken and introduced in evidence against him.

Prior to trial, the prosecutor and defense attorney stipulated that the

street upon which petitioner was operating was a public way, it being an element of the offense that operation occur on a public way. The state rested before disclosing this stipulation to the jury. Petitioner's attorney then asked to approach the bench where he noted the prior agreement and stated that he wasn't sure what it was his responsibility to do at that point. (R.74; Petition 7-8). The trial judge stated that he would allow the state to reopen and himself disclosed the stipulation (Ibid). Petitioner apparently agreed it was proper for the trial judge to do so, for he stated it was "probably the fairest thing to do." (Ibid). Petitioner never moved to dismiss and never objected to the trial judge's action. The most that petitioner's counsel did, following a recess was ask

that his exception be noted to the so-called reopening and disclosure of the agreement. The trial court gave him an exception. (R. 75; Petition 8).

ARGUMENT

THE SUPREME COURT OF NEW HAMPSHIRE IN THIS CASE HAS DECIDED NO QUESTION OF SUBSTANCE NOT PREVIOUSLY DECIDED BY THIS COURT AND HAS RULED CORRECTLY ON EACH QUESTION.

I.

Petitioner's first claim is that he was denied a Constitutionally guaranteed right to counsel when he was not allowed at the last minute to defer the drawing of a blood sample until after he had consulted with counsel on the evening of his arrest. It should be noted that the petition for writ of certiorari does not disclose the stage in

the proceedings and the manner in which a Constitutional claim was raised, as required by Rule 23(f). In fact, at no time in the trial court did petitioner properly raise a Constitutional issue. At the close of the state's case, he moved for directed verdict claiming that evidence of blood test was admitted in "violation of his constitutional rights." (R.76). It was only in the New Hampshire Supreme Court that precise references to the Sixth Amendment occur. See Opinion of Supreme Court of New Hampshire, Petition 14.

The only Constitutional issue thus considered by the Supreme Court of New Hampshire was considered by this Court in Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d. 908, 86 S. Ct. 1826 (1966). Having determined that petitioner there had no right under the Fifth and

Fourteenth Amendments to refuse, and to have excluded from evidence against him, a sample of his blood withdrawn under medically sound circumstances, this Court held petitioner had no right to the assistance of counsel derived from the Sixth Amendment, prior to the taking of the sample. The present petitioner attempts to justify the assertion of a Sixth Amendment right in this case on the ground that under New Hampshire law blood may not be taken against his will, subject to the penalty of revocation of his license to operate a motor vehicle for refusal.

He then argues that because New Hampshire does not assert its right to withdraw blood as far as it Constitutionally may do so, a new Sixth Amendment right to the assistance of counsel is

Further, the necessity for speed in withdrawing a blood sample, recognized by this Court in Schmerber v. California, 384 U.S. 757, 770-1, 16 L.Ed. 2d 908, 920, 86 S. Ct. 1826, _____ (1966), would support the state's position even if the answer were otherwise in doubt. So, too, would the reasonableness of the state's legal requirement that one so arrested be informed of his right to a similar test by one of his own choosing and of the legal consequences of refusing to allow the sample to be withdrawn.

II.

Petitioner's second claim is that he was twice put in jeopardy within the meaning of the Fifth Amendment by the trial judge's announcement after the state had rested that the parties agreed that the street upon which operation took place was a

public way. Apart from a disregard of the requirements of Rule 23(f), and apart from petitioner's apparent express concurrence with the trial judge's action until some time after the announcement was made, respondent submits that it is sufficiently obvious that petitioner was not " . . . for the same offense . . . twice put in jeopardy . . . ."

Hence, respondent submits that the New Hampshire Supreme Court has decided no substantial federal question not previously determined by this Court, and submits that its conclusions are correct.

CONCLUSION

Respondent State of New Hampshire respectfully submits the petition for writ of certiorari should be denied.

Respectfully submitted,

The State of New Hampshire

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